80-1785

No. _____

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

A & B FREIGHT LINES, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

The Federal Trade Act excepts common carriers subject to the Interstate Commerce Act from the grant of authority to the Federal Trade Commission "to gather and compile information concerning . . . any person, partnership, or corporation engaged in or whose business affects commerce. . . ." The question posed here is:

Whether petitioners, who are common carriers subject to the Interstate Commerce Act, can maintain an action against the Federal Trade Commission for exceeding its statutory authority in gathering and compiling information concerning such carriers, without a showing, made by way of the complaint, of "irreparable injury".

PARTIES TO THE PROCEEDINGS BELOW

Petitioners (Appellants In The Court Of Appeals, Plaintiffs In The District Court)

A & B Freight Lines, Inc.
Advance Transportation Company
American Freight System, Inc.
American Freightways Company, Inc.
Arkansas-Best Freight System, Inc.
Associated Truck Lines, Inc.
Bilkays Express Company
Bowman Transportation, Inc.
Branch Motor Express, Inc.
Bronaugh Motor Express, Inc.
Carolina Freight Carriers Corporation
Central Freight Lines, Inc.
Central Transport, Inc.
Central Truck Lines, Inc.
Commercial-Lovelace Motor Freight, Inc.

Consolidated Freightways Corporation
CW Transport, Inc.
Delta Lines, Inc.
Dohrn Transfer Company
ET & WNC Transportation Company
Exhibitors Service Company
Fowler & Williams, Inc.
Georgia Highway Express, Inc.
Gordons Transports, Inc.
Graves Truck Lines, Inc.
Holmes Transportation, Inc.
Illinois-California Express, Inc.
Interstate Motor Freight System
Jersey Coast Freight Lines
Johnson Motor Lines, Inc.
Jones Motor
Kroblin Refrigerated Xpress
Lee Way Motor Freight, Inc.
Lombard Bros., Inc.
Motor Freight Express
Murphy Motor Freight Lines, Inc.
O.K. Trucking Company, The
Overnite Transportation Company
Pacific Intermountain Express Company
Preston Trucking Company, Inc.
Red Arrow Freight Lines, Inc.
Red Ball Motor Freight, Inc.
Roadway Express, Inc.
Rudolph Express Co.
Ryder Truck Lines, Inc.
Shippers Express, Inc.
Smith's Transfer Corporation
Southeastern Freight Lines
Spector Freight System, Inc.
Strickland Transportation Company

Tidewater Inland Express, Inc.
Transcon Lines
United Trucking Service, Inc.
Ward Trucking Corporation
Wilson Freight Company
Yellow Freight System, Inc.

Respondents (Appellees In The Court Of Appeals, Defendants In The District Court)

Federal Trade Commission

Michael Pertschuk
Chairman
Federal Trade Commission

Paul Rand Dixon
Commissioner
Federal Trade Commission

David A. Clanton
Commissioner
Federal Trade Commission

Robert Pitofsky
Commissioner
Federal Trade Commission

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

A & B FREIGHT LINES, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above case on January 26, 1981.

OPINIONS AND ORDERS BELOW

The Court of Appeals wrote no opinion. Its judgment appears at page 12a of the Appendix hereto. The memorandum opinion and order of the United States District Court for the District of Columbia Circuit, in which court this cause originated, are not yet reported. They appear at pages 1a-10a of the Appendix hereto. The order of the District Court denying rehearing appears at page 11a of the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Trade Commission Act, 15 U.S.C. §§41-58: Section 5(a) of the Act, 15 U.S.C. §45(a) provides:

> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Acts to regulate commerce, 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 6(a) of the Act, 15 U.S.C. §46(a) provides:

> The Commission shall also have power —
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions described in section 57a(f)(3) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

* * *

> Provided, That the exception of "banks, savings and loan institutions described in section 57a(f)(3) of this title, and common carriers subject to the Act to regulate commerce" from the Commission powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking, in business as a savings and loan institution, or in business as a common carrier subject to the Act to regulate commerce.

Section 11 of the Act, 15 U.S.C. §51, provides:

> Nothing contained in sections 41 to 46 and 47 to 58 of this title shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in said sections be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

STATEMENT OF THE CASE

Petitioners are motor common carriers of property operating in interstate and foreign commerce pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission (ICC). Petitioners are regulated by the ICC and are subject to the Interstate Commerce Act, 49 U.S.C. §10101, *et seq.*

The Federal Trade Commission Act, 15 U.S.C. §§41-58, exempts common carriers subject to the Interstate Commerce Act from regulation or investigation

by the Federal Trade Commission (FTC). Specifically, Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(2), in delineating the FTC's authority to regulate, states in part:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations except banks, common carriers subject to the Acts to regulate commerce, . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.[1]

The same statutory limitation exists with respect to the FTC's power to investigate. Section 6(a) of the Federal Trade Commission Act, 15 U.S.C. §46(a), provides:

> The Commission shall also have power —
>
> (a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Section 11 of the Federal Trade Commission Act, 15 U.S.C. §51, further provides that "[n]othing contained in [the FTC Act] shall be construed to prevent or interfere with the enforcement of the provisions of . . . the Acts to regulate commerce, nor shall anything contained in [the FTC Act] be construed to alter, modify, or repeal . . . the Acts to regulate commerce or any part or parts thereof."

[1] The words "Acts to regulate commerce" are defined in §4 of the Federal Trade Commission Act, 15 U.S.C. §44, to include the Interstate Commerce Act, as amended.

Notwithstanding these express statutory prohibitions, the FTC is gathering and compiling information concerning, and investigating motor common carriers subject to the Interstate Commerce Act. As a part of its investigation, the FTC has let contracts to non-government consultants to produce studies that would (1) use the value of transferred trucking certificates to assess the effects of regulation on price discrimination in the trucking industry; (2) "ascertain the viability of using contract carriage to insure stability under deregulation" in the trucking industry; (3) assess whether independent action rates in trucking rate bureaus represent competitive or monopolistic pricing; and (4) compare the economic performance of the trucking industry under ICC regulation with its expected performance in a deregulated environment. Each of these contracts requires for its performance the investigation and compilation of information derived from individual motor common carriers of property and from groups of such carriers.

In addition, the FTC filed a pleading styled "Petition of the Federal Trade Commission to Reopen the Record for the Purpose of Receiving Newly Discovered Evidence" in an Interstate Commerce Commission proceeding in which petitioners are parties. This pleading contained a study of the motor common carrier industry which resulted from a contract similar to those described above. The contract authorized non-government consultants to analyze certain motor carrier data which was made available to the Senate Judiciary Committee by the carriers' rate bureaus, and which the Committee made available to the FTC. The study was intended to make "a compelling case for withdrawing antitrust immunity for long-haul carriers of LTL general commodities."

It is the petitioners' position that the actions of the FTC described above are patently in violation of the statutory bar to FTC investigation of ICC-regulated motor common carriers. The carriers sought declaratory and injunctive relief against such actions. The FTC moved to dismiss the complaint on grounds that "the Court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief can be granted." The FTC also argued for dismissal on the ground that "the alleged injuries to plaintiff do not amount to 'irreparable injury.'"

Following the submission of the carriers' memorandum in opposition to the motion to dismiss and without oral argument, the District Court granted the FTC's motion and ordered the complaint dismissed (Appendix, p. 10a). The District Court held that the carriers failed to establish two "requisites" for relief: (1) "a clear statutory right infringed upon by unlawful agency action"; and (2) "irreparable injury" (Appendix, p. 7a). The carriers filed a motion for rehearing which was denied (Appendix, p. 11a).

The carriers appealed the District Court's decision to the United States Court of Appeals for the District of Columbia Circuit. On January 26, 1981, the Court of Appeals entered its judgment affirming the judgment of the District Court (Appendix, p. 11a). Stating that "the issues presented occasion no need for an opinion", the Court held:

> This court is of the view that appellants have not shown irreparable injury to support their petition for an injunction. Consequently, we find it unnecessary to reach the merits of this case.

REASONS FOR GRANTING THE WRIT

Petitioners submit that the Court of Appeals has decided an important question of federal law in a way in conflict with applicable decisions of this Court and in conflict with the decisions of other courts of appeals. In failing to reach the merits of the case, the Court has established as a threshold test the requirement that a party show "irreparable injury" to maintain an action against an agency for violating an express statutory prohibition. This is contrary to the applicable decisions of this Court.

In *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 559 (1919), this Court held that a district court had jurisdiction to enjoin an order of the ICC which was in excess of its statutory authority. The Court held:

> The contention is that the Commission has exceeded its statutory powers; and that hence, the order is void. In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding before the Commission.

In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), the National Labor Relations Board certified a bargaining unit which included both professionals and non-professionals without a vote of the professionals, in violation of an express statutory prohibition. The Board contended that the district court did not have power to entertain a suit challenging its action. This Court held that it did. It characterized the suit as "one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. According to the Court, when the Board certified the unit and thus acted in excess of its delegated powers, it "deprived the professional employees of a 'right' assured to them by Congress." 358 U.S. at 189. This

right would be obliterated if the district court did not have jurisdiction to entertain the suit because the professional employees had no other means to protect the right. The Court said that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190.

The Court in *Leedom* v. *Kyne* quoted from *Texas & New Orleans R. Co.* v. *Brotherhood of Railway & S. S. Clerks*, 281 U.S. 548 (1929), as follows:

> While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded * * *. If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose * * *. The definite prohibition which Congress inserted in the act can not therefore be overriden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." 281 U.S. at pages 568-569.

This Court did not require a showing of "irreparable injury" in *Skinner & Eddy, supra,* and *Leedom* v. *Kyne, supra.* Rather, as the Court put it in *Elmo Division of Drive-X Company* v. *Dixon*, 348 F.2d 342, 345 (D.C. Cir. 1965), this Court held in those cases that agency action would be enjoined upon a showing that "the agency's action violated express statutory conditions of its authority which were found to give rise to enforceable rights in the parties for whose protection they existed."

Moreover, it is well established in the lower federal courts that in cases where there has been a clear violation of a federal statute, a Court may grant an injunction against further violations without a showing of irreparable injury. In *National Wildlife Federation* v. *Andrus*, 440 F. Supp. 1245, 1255 (D.D.C. 1977), the Court said:

> . . . where a federal statute has been violated, the court will not inquire into the traditional requirements for equitable relief but will instead grant an injunction against further violation of the statute without regard to those requirements. [citations omitted.]

See also *Community Nutrition Institute* v. *Butz*, 420 F. Supp. 751, 754 (D.D.C. 1976); *Sierra Club* v. *Coleman*, 405 F. Supp. 43, 45 (D.D.C. 1975); *Atchison, Topeka & Santa Fe Railway Co.* v. *Callaway*, 382 F. Supp. 610, 623 (D.D.C. 1974), *vacated*, 431 F. Supp. 722 (D.D.C. 1977).

This Court's decision in *United States* v. *City and County of San Francisco,* 310 U.S. 16, *reh. denied*, 310 U.S. 656 (1940), also supports our position that irreparable injury need not be shown in a case such as this. In that case, the U.S. government brought suit to enjoin San Francisco from violating a condition of the Raker Act. Through the Raker Act, Congress conditionally granted certain lands to the city so that it could establish electric power plants. The act specifically required the city to comply with all specified conditions. It also required the Attorney General to enforce the act by lawsuit if necessary. This Court granted the injunction without considering the traditional requirements for equitable relief. In the opinion of the Court:

> [t]he equitable doctrines relied on do not militate against the capacity of a court of equity as a proper

> forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use — in violation of that policy — of property granted by the United States . . . is both appropriate and necessary. [footnote omitted.] 310 U.S. at 31

Clearly, therefore, petitioners were not required to show irreparable injury in order to maintain this action. They were required only to show that the FTC deprived them of a "right assured to them by Congress," and that they had no other means to protect that right. *Leedom* v. *Kyne, supra.*

There is a precedent for the application of the *Kyne* doctrine to the case at bar. In *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977), the plaintiff alleged that the FTC was investigating a common carrier in violation of Section 6 of the Federal Trade Commission Act. In considering whether the carrier's immunity from investigation could be raised in a subpoena enforcement proceeding, the court found *Kyne* to be controlling. 549 F.2d at 462. The Court held that a common carrier has "a clear right, conferred upon it by statute, to be free from [FTC] investigation."

In this case, as in *Miller*, the carriers established that there was a violation of this statutory right. In its brief to the Court of Appeals, the FTC acknowledged that it has urged the Interstate Commerce Commission to "withdraw antitrust immunity from various motor carrier rate bureaus" and "has also petitioned the ICC to institute rulemaking proceedings on other subjects related to motor carrier deregulation." It also conceded that "[t]o obtain a factual and analytical basis for submitting such pleadings . . . the FTC has engaged consultants in the transportation field to conduct studies of the motor carrier industry and to prepare written

testimony for submission to the ICC." (Brief, pp. 2-3). Notwithstanding these undisputed facts and the unqualified statutory exemption from FTC regulation and investigation for common carriers subject to the Interstate Commerce Act, the FTC strove to perpetuate its unlawful activities. It did so by arguing first that the statute does not mean what it says. The FTC argued that it *does* have power "to gather and compile information concerning . . . common carriers," although the statute specifically exempts common carriers from this grant of authority. Its second argument was based on the false premise that the ICC had jurisdiction to determine whether the FTC is violating the FTC Act when it investigates carriers or participates in ICC proceedings. It proceeded from that premise to its argument that judicial review of ICC decisions prompted by the FTC activities can remedy any injury to the carriers.

We showed that the first argument was wholly specious. The statute obviously does mean what it says. The FTC clearly *does not* have power "to gather and compile information concerning . . . common carriers."

The FTC's suggestion that the carriers had a remedy before the ICC apparently confused the courts below. The FTC attempted to treat this case as though the District Court was asked to enjoin an ongoing agency proceeding which could be subjected to review upon its conclusion. Hence, it repeatedly referred to "extraordinary" judicial relief and cited cases dealing with the question of whether "exhaustion of administrative remedies" should be required. The District Court erroneously relied on those cases in dismissing the complaint. Petitioners did not ask the Court to interfere with any ongoing agency proceeding. Rather, they asked the Court to declare that the FTC is acting in excess of its

statutory authority, and to enjoin it from continuing this activity. Such a case does not call for "extraordinary" judicial relief or a showing of "irreparable injury."

In this case, there were no administrative remedies to be exhausted. The FTC has initiated no formal proceedings against common carriers and it is not likely to do so in view of the limitation placed on its authority by the *Miller* decision, *supra*. Hence, it will undoubtedly continue to attempt to do indirectly what it cannot do directly by presenting the results of its investigations to the ICC and Congress rather than attempting to act on them itself. Moreover, since the ICC plainly has no jurisdiction to determine if the FTC is violating the FTC Act, there were no administrative remedies for petitioners to exhaust at that agency.[2] And, since petitioners complain of more than FTC participation in ICC proceedings, the exhaustion of remedies argument would not be dispositive of this case in any event.[3]

Clearly, therefore, petitioners met the requirements of the *Kyne* doctrine by showing (1) that the FTC deprived them of "a right assured to them by Congress" and (2) that they had no other means to protect that right. Accordingly, the Court of Appeals erred in holding that the petitioners were required to show "irreparable injury."

[2] Even if petitioners were able to raise their claim upon judicial review of an ICC order, that fact would not bar a proceeding to enjoin the FTC where "jurisdictional defects are apparent on the face of the record" and where there will be no judicial interference with an ongoing agency proceeding. See *California ex rel. Christensen* v. *FTC*, 549 F.2d 1321, 1324 (9th Cir. 1977); *Leedom* v. *Kyne*, *supra*.

[3] Petitioners complain of the FTC's gathering and compiling information about them. Even if the FTC did not use the information so gathered in ICC proceedings, the FTC would nonetheless have plainly violated the limits on its jurisdiction.

Finally, even if a showing of "irreparable injury" were required, such a showing "need not be made by way of complaint — plaintiffs need not plead evidence." *Fairchild, Arabatzis & Smith* v. *Sackheim*, 451 F. Supp. 1181, 1188 (S.D. N.Y., 1978). Clearly, plaintiffs alleged irreparable injury in the complaint. Irreparable injury is that imminent harm which cannot be remedied by way of an action at law. *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49 (1975). The types of injury set forth in the complaint meet this criteria.

As we established, the FTC has, in the past, used information it has gathered to support positions harmful to carriers in ICC proceedings and in proceedings of other regulatory and legislative forums. And, in the past, the carriers have had to expend considerable time, resources, and effort to rebut those studies. Carriers continue, in fact, to do battle with the FTC in various regulatory and legislative forums. Manifestly, if the FTC's actions are unlawful, a showing that the carriers are required to expend effort to rebut the product of that activity would be sufficient to demonstrate irreparable injury.

PRAYER

Petitioners submit that the foregoing establishes the presence of "special and important" reasons for granting this petition.

Wherefore, Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1986

A & B FREIGHT LINES, INC., *et al., Plaintiffs,*

v.

FEDERAL TRADE COMMISSION, *et al., Defendants.*

Memorandum
(Filed January 7, 1980)

This matter is before the Court on the defendants' motion to dismiss pursuant to Rule 12(b), Fed. R. Civ. P., for lack of subject matter jurisdiction and failure to state a claim for relief. Plaintiffs are common carriers subject to regulation by the Interstate Commerce Commission. They have filed this action for declaratory and injunctive relief against an "investigation" and related actions undertaken by the defendant Federal Trade Commission that allegedly are in excess of its statutory authority. For the reasons more fully set forth below, the Court will grant the defendants' motion. The plaintiffs' claim does not present the extraordinary circumstances that justify judicial interference in agency activity in the absence of agency action made reviewable by the Administrative Procedures Act.

The Federal Trade Commission Act, 15 U.S.C. §§41-58 (1976) ("Act"), specifically exempts common carriers subject to the Interstate Commerce Act from investigation or regulation by the FTC. Section 5(a) of the Act, 15 U.S.C. §45(a), which sets forth the Commission's authority to regulate, states:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations except banks,

> [and] common carriers subject to the Acts to regulate commerce, . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Section 6(a) of the Act, 15 U.S.C. §46(a), which governs the FTC's authority to investigate, states:

> The Commission shall also have power — (a) to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

Plaintiffs allege that the FTC has violated express statutory prohibitions by (1) letting contracts to non-government consultants to study a number of aspects of pricing, competition, and regulation of the trucking industry, apparently in violation of section 6(a), 15 U.S.C. §46(a); (2) participating as a party in numerous ICC proceedings involving common carriers; and (3) petitioning the ICC to institute a rulemaking proceeding, in violation of section 5, 15 U.S.C. §45(a)(2). The FTC has not instituted any formal investigation of the defendants nor has it subpoenaed any documents or witnesses. However, plaintiffs allege that the consultant contracts will require for their performance "information derived from" carriers.

Plaintiffs do not allege that these activities by the FTC constitute reviewable agency action under the APA; they do not seek review of the substance of an agency rule, order or policy. Rather, plaintiffs seek extraordinary judicial review pursuant to the doctrine enunciated by the Supreme Court in *Leedom* v. *Kyne,* 358 U.S. 184 (1958). In *Leedom,* the Court concluded that the District Court had jurisdiction where the agency violated its statutory command by failing to allow professional employees to vote on whether they desired to be in-

cluded in a unit with non-professionals, and the professionals had no effective way of presenting their claim of invalidity at a later date. *Leedom,* however, did not confer plenary jurisdiction on the District Courts to weigh every agency action against its statutory authority. The decision must be read in conjunction with the Supreme Court's earlier decision in *Meyers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938), and subsequent decisions in this Circuit and others confirming that the *Leedom* exception is available only in specific, narrowly circumscribed situations. In brief, the *Leedom* doctrine provides relief only where the allegedly unauthorized agency action would destroy a clear, specific statutory right not otherwise protected either because (a) no review is later available;[1] (b) the later substantive review would not compensate for the loss of a specific procedural right;[2] or (c) the standard of review would alter if the issue were reserved for later appeal.[3] The doctrine draws on concepts of exhaustion, finality, primary jurisdiction and equity to prevent interference with ongoing agency proceedings unless absolutely necessary. As stated by Judge Leventhal, the exercise of jurisdiction under *Leedom* requires that:

> The papers establish on their face a plain violation by the [agency] of a statutory command which warrants immediate intervention of an equity court.

International Association of Machinists & Aerospace Workers v. *National Mediation Board,* 138 U.S. App. D.C. 96, 105, 425 F.2d 527, 536 (1970); *see also Municipal Light Boards* v. *FPC,* 146 U.S. App. D.C. 294, 450 F.2d 1341, 1352 & n. 24 (1971), *cert. denied,* 405 U.S. 989 (1972). Whether a failure to meet this high standard is characterized as divesting the

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[1] *See Leedom* v. *Kyne,* 358 U.S. 184, 186 (1958).

[2] *See Elmo Division of Drive-X Co.* v. *Dixon,* 121 U.S. App. D.C. 113, 348 F.2d 342, 347 (1965).

[3] *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557, 562 (1919); *Jewel Companies, Inc.* v. *FTC,* 432 F.2d 1155, 1159 (7th Cir. 1970).

District Court of jurisdiction or failing to state a claim for relief, the consequences are identical: the District Court should not intervene in the ongoing agency procedures. For the following reasons, the instant case does not meet this standard and should be dismissed.

First, the plaintiffs' complaint does not demonstrate that the questioned action by the FTC "is plainly without any statutory authority or in defiance of a 'clear and mandatory' statutory command or reflects an error evident on the fact of the papers." *Municipal Light Boards* v. *FPC*, 450 F.2d at 1352. The FTC's intervention in proceedings at the ICC does not constitute "regulation" prohibited by section 5(a) of the Act, 15 U.S.C. §45(a). It does not involve the exercise of any of the forms of authority to regulate granted by Congress in support of section 5(a), and has no direct effect on plaintiffs. Rather, the FTC's participation reflects a use of:

> implied powers in a government agency — unless precluded by a contrary provision expressed or clearly discernible in its organic statute —to cooperate with other government agencies concerning intermesh of jurisdiction or other matters of mutual concern.

Municipal Intervenors Group v. *FPC*, 153 U.S. App. D.C. 373, 473 F.2d 84, 90 (1972).

Nor is the FTC's letting of contracts to consultants to acquire information "derived from" carriers plainly in violation of section 6(a) of the Act. Even as to questions of law, the agency has primary jurisdiction to determine the scope of its own jurisdiction. *See Udall* v. *Tallman*, 380 U.S. 1, *reh. denied*, 380 U.S. 989 (1965); *Casey* v. *FTC*, 578 F.2d 793, 798 (9th Cir. 1978); *California ex rel Christensen* v. *FTC*, 549 F.2d 1321 (9th Cir.), *cert. denied*, 434 U.S. 876 (1977).

The Commission makes a strong argument based on legislative history that in creating the Federal Trade Commission, the Congress intended to vest in the Commission the same authority to investigate that was exercised by its predecessor, the Bureau of Corporations. *See* H.R.Rep. 1142,

63d Cong., 2d Sess. (1914) 11, 18. The Bureau of Corporations had unquestioned authority to compile information *about* common carriers — which is the issue here — although its authority to compel reports or subpoena information *from* such firms was limited. *See* Pub. L. No. 87, §6, 32 Stat. 825 (1903). Moreover, a proviso to section 6, added as Pub. L. No. 93-153, §408(e), 87 Stat. 592 (1975), codified at 15 U.S.C. §46(h), which limits the common carrier exception to the FTC's investigatory powers, implies that the prohibition does not extend to information obtained *about* common carriers through third parties. The proviso notes that in certain circumstances, not here relevant, the limitation on the FTC's authority "shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers *from*, any person. . . ." 15 U.S.C. §46(h). The necessary implication of this proviso is that Congress did not interpret the limitations under 15 U.S.C. §46(a) to encompass reports obtained from third parties.[4]

Finally, the Commission contends that it derives authority from other statutory provisions to study corporations and their activities generally and make public reports and recommendations to Congress for new legislation. *See* 15 U.S.C. §46(f). The Commission is further directed by statute, Pub. L. No. 94-210, §208(b)(10), 90 Stat. 45 (1976), to report to the ICC on the antitrust consequences of certain rate applications of railroads, which are plainly common carriers. If the limitation of 15 U.S.C. §46(a) were read as plaintiffs would contend to bar the FTC from obtaining information about common

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[4] In *FTC* v. *Miller*, 549 F.2d 452, 459 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit held that the above-quoted proviso did not grant the FTC authority to investigate non-carrier activities of a common carrier. However, neither the holding nor the analysis addresses the issue of statutory interpretation here at issue. In *Miller*, the FTC was seeking enforcement of its own subpoena directed to a common carrier.

carriers from third parties, the FTC would be unable to discharge fully its responsibilities under these provisions.

The FTC's argument is particularly compelling here since the consultant contracts which plaintiffs protest have only been let, not completed or used for a specific purpose. Even if it were held that the FTC could not acquire information about third parties for regulatory purposes, there is no evidence here that the contracts at issue would be forbidden. *Compare FTC* v. *Miller,* 549 F.2d at 456.

The plaintiffs' reliance on *FTC* v. *Miller* is misplaced. There, in considering the plaintiff's challenges to an investigative subpoena issued pursuant to section 9 of the Act, 15 U.S.C. §49, the Court of Appeals for the Seventh Circuit held that section 6 prohibited the FTC from investigating non-carrier activities of common carriers. In *Miller,* the FTC had adopted a formal resolution authorizing an investigation into whether the plaintiff, a common carrier, was engaged in false or misleading advertising in violation of section 5 of the Act. 549 F.2d at 454. It sought information directly from the plaintiff by subpoena. *Id.* The Court held that the FTC did not have authority to investigate the non-carrier activities of the plaintiff. 549 F.2d at 460. The Court in *Miller*, however, did not address the question raised here of whether the use of consultants to prepare reports using information not obtained directly from the carriers constituted an investigation within the meaning of section 6 of the Act. Nor did the Court consider whether the FTC's information-gathering might be supported under any other statutory authority besides section 6. 549 F.2d at 456. Finally, although the Court professed to apply the standards of *Leedom* v. *Kyne* in considering whether to consider the plaintiff's jurisdictional claim, 549 F.2d at 460, the Court's inclination to review the FTC's jursidiction was plainly influenced by other factors, including the fact that the parties were already properly before the Court on the FTC's motion to enforce its subpoena pursuant to section 9 of the Act, 15 U.S.C. §49. *See* 549 F.2d at 460-63.

Even if the plaintiffs were to meet the first requirement for review under *Leedom* — a clear statutory right infringed upon by unlawful agency action — they have failed to establish the second requisite for declaratory and injunctive relief — irreparable injury. *See California ex rel. Christensen* v. *FTC*, 549 F.2d at 1323-24; *Municipal Light Boards* v. *FPC*, 450 F.2d at 1352 & n.24; *International Association of Machinists & Aerospace Workers* v. *National Mediation Board*, 425 F.2d at 536. The complaint alleges five types of harm flowing from the FTC's actions:

> (a) harassment of plaintiffs caused by the investigation of them by the FTC;
>
> (b) exposure of plaintiffs, already regulated by the ICC, to the incompatible regulatory scheme of the Federal Trade Commission Act;
>
> (c) furtherance of the FTC's already active efforts to persuade the ICC to eliminate regulations which are designed to benefit plaintiffs, their shipper customers in furtherance of the public interest;
>
> (d) expenditure of considerable sums of money by plaintiffs to rebut the results of the studies produced by the FTC; and
>
> (e) waste of government resources, and hence plaintiffs' tax dollars, on projects which the Congress has forbidden the FTC to undertake.

Complaint, July 30, 1979, at ¶ 15.

If by harassment, plaintiffs complain of the expenses or inconvenience of having to defend against a regulatory proceeding, it is clear that this does not constitute irreparable injury. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. at 50; *California ex rel. Christensen* v. *FTC*, 549 F.2d at 1323. If by "harassment" plaintiffs intend to refer to some other alleged harm, it is too speculative to justify equitable intervention.

Plaintiffs' second allegation also is without merit. Nothing in their complaint demonstrates any effort by the FTC to "regulate" plaintiffs. If the defendants ultimately sought to exercise authority under section 5, 15 U.S.C. §45, the plaintiffs would have ample opportunity to raise jurisdictional defenses at that time. *See Atlantic Richfield Co.* v. *FTC,* 546 F.2d 646, 650 (5th Cir. 1977).

The third allegation is also insufficient, since it rests upon the presumption that the ICC will — as a direct result of the blandishments of the FTC — abdicate its responsibility to exercise its authority consistently with the public interest. The allegation is wholly speculative and, at best, premature. Moreover, even if the FTC were acting outside its authority in participating in the ICC hearings, *but see* page 4, *supra,* the plaintiffs' rights as to the substance of the outcome of the ICC proceedings are fully protected by a direct appeal at law. *See Casey* v. *FTC,* 578 F.2d at 796 n.5.

The allegation that the plaintiffs will be harmed by having to rebut the results of the studies also falls short of irreparable injury. The studies at issue have not been completed, nor have the plaintiffs made any allegations as to the use to which the reports will be put. Even assuming that the reports are about to be published and that the plaintiffs would have to "rebut" their contents, the plaintiffs have no right to equitable relief. *See Brandenfels* v. *Day,* 114 U.S. App. D.C. 374, 316 F.2d 375, 378, *cert. denied,* 375 U.S. 824, *reh. denied,* 375 U.S. 926 (1963).

Finally, it is clear that "waste of government resources" does not constitute irreparable injury. *California ex rel. Christensen* v. *FTC,* 549 F.2d at 1323 & n. 2.

Accordingly, because the plaintiffs cannot satisfy the stringent tests for the exercise of review under the *Leedom* doctrine, it would be inappropriate at this time for the Court to interfere with the Commission's activities.

Accordingly, the defendants' motion to dismiss will be granted.

/s/ LOUIS F. OBERDORFER
Louis F. Oberdorfer
United States District Judge
(January 6, 1980)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1986

A & B FREIGHT LINES, INC., *et al., Plaintiffs,*

v.

FEDERAL TRADE COMMISSION, *et al., Defendants.*

Order
Filed January 7, 1980

Upon consideration of defendants' motion to dismiss, the opposition thereto, the record herein and for the reasons stated in the Court's Memorandum herein, it is therefore, this 6th day of January, 1980.

ORDERED: That said motion be and is hereby GRANTED and the complaint is herein DISMISSED.

/s/ LOUIS F. OBERDORFER
Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-1986

A & B FREIGHT LINES, INC., *et al., Plaintiffs,*

v.

FEDERAL TRADE COMMISSION, *et al., Defendants.*

Order
Filed February 4, 1980

On January 18, 1980, plaintiffs moved for a re-hearing in the above-captioned case, which was dismissed by Order of January 9, 1980. Plaintiffs alleged that newly discovered evidence — the use by defendants of consultants' reports in ICC proceedings — requires the Court to vacate its judgment and enter new findings and conclusions.

In ruling on the defendants' motion to dismiss, the Court accepted as true the allegations of fact contained in plaintiffs' complaint. These allegations included, in substance, the facts that plaintiffs now seek to prove through newly discovered evidence. Consideration of the evidence now would not, accordingly, affect the result reached by the Court or the analysis employed.

Accordingly, upon consideration of plaintiffs' motion for rehearing and the opposition thereto, and the whole record in this case, it is, this 4th day of February, 1980, hereby

ORDERED: That plaintiffs' motion is DENIED.

/s/ LOUIS F. OBERDORFER
Louis F. Oberdorfer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-1986
No. 80-1264

A & B FREIGHT LINES, INC., *et al., Appellants,*

v.

FEDERAL TRADE COMMISSION, *et al., Defendants.*

Appeal from the United States District Court for the District of Columbia.

Before: WRIGHT, ROBB, and EDWARDS, *Circuit Judges.*

JUDGMENT
(Filed January 26, 1981)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

This court is of the view that appellants have not shown irreparable injury to support their petition for an injunction. Consequently, we find it unnecessary to reach the merits of this case.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court
/s/ GEORGE A. FISHER
George A. Fisher
Clerk